94

(3)

FILED
JUN 10 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1175

In The
Supreme Court of the United States

CATHERINE BURKE and MIKAEL ROLFHAMRE,
Petitioners,

v.

THE BROOKLINE SCHOOL DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

DEAN B. EGGERT, ESQ.
Counsel of Record
ALISON M. MINUTELLI, ESQ.
WADLEIGH, STARR & PETERS, P.L.L.C.
95 MARKET STREET
MANCHESTER, NH 03101
(603) 669-4140

Attorneys for Respondent

June 10, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Table of Authorities ii

Respondent's Supplemental Brief 1

Conclusion 3

TABLE OF AUTHORITIES

Cases

Burke v. Brookline Sch. Dist.,
257 Fed. App'x 335 (1st Cir. 2007) 3

Diaz-Fonseca v. Puerto Rico,
451 F.3d 13 (1st Cir. 2006) 1, 2

M.M.R.-Z. v. Puerto Rico,
___ F.3d ___, 2008 WL 2285185
(1st Cir. June 5, 2008) 1, 2

Statutes

20 U.S.C. § 1400, *et seq.* 1

29 U.S.C. § 794 1

42 U.SC. § 12132, *et seq.* 1

Rules

Supreme Court Rule 15.8 1

RESPONDENT'S SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, the Brookline School District ("School District") respectfully submits this Supplemental Brief in Opposition to the Petition for Certiorari, to bring to the Court's attention new authority that casts further doubt on the need for review in this case.

On June 5, 2008, the United States Court of Appeals for the First Circuit filed a decision in the case of *M.M.R.-Z. v. Puerto Rico*, ___ F.3d ___, 2008 WL 2285185 (1st Cir. June 5, 2008). The *M.M.R.-Z.* case illustrates that the First Circuit will allow plaintiffs to proceed with claims for damages under the Americans with Disabilities Act, 42 U.SC. § 12132 *et seq.* ("ADA") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), when they are truly independent of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et. seq.* ("IDEA"). As this is a new case, it was not available at the time the Respondent filed its Brief in Opposition.

In *M.M.R.-Z.*, the First Circuit rejected the defendants' argument that the plaintiff's claims for damages under Section 504, ADA, and Title IX were barred based on § 1415(*l*) of the IDEA. *M.M.R.-Z.*, ___ F.3d ___, 2008 WL 2285185, **3-4. The court noted that, "on its face, IDEA does not preclude claims against the Commonwealth, or the individual defendants, under the ADA, the Rehabilitation Act or (arguably) Title IX as applied to a disabled child." *Id.* at *4. The court then distinguished *Diaz-Fonseca*, noting that although it has "held that relief under these other statutes is not available where '[p]laintiffs'

case turns entirely on the rights created by statute in the IDEA,' . . . here plaintiffs' claim is 'independently available through other sources of law,' namely the retaliation provisions of the three statutes here invoked." *Id.* (quoting *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (1st Cir. 2006). M.M.R.-Z.'s claims "rest[ed] on improper retaliatory intent, [were] by no means mirrors of the IDEA, and [were] not within the rationale of *Diaz-Fonseca*." *Id.*

Contrary to Petitioners' assertions, it is clear from the *M.M.R.-Z.* decision that the First Circuit is not interpreting its *Diaz-Fonseca* holding in a manner that would preclude plaintiffs from seeking compensatory damages under Section 504 or the ADA. *See* Petition at 8. Instead, the *M.M.R.-Z.* decision indicates that the First Circuit will interpret *Diaz-Fonseca* in a manner that is consistent with § 1415(*l*) of the IDEA, as well as with the decisions from other circuits. ___ F.3d ___, 2008 WL 2285185, *4.

The *M.M.R.-Z.* case illustrates that the First Circuit, like the other circuit courts, will allow plaintiffs to proceed with claims for damages if the claims are truly independent of the IDEA. *Id.* The courts below found that Petitioners did not allege independent ADA or Section 504 claims; accordingly, their complaint, which sought compensatory damages, was dismissed in accord with *Diaz-Fonseca*. *See* Appendix to Petition for Writ of Certiorari ("Petitioners' Appendix") at 14-15 (District Court Order of January 29, 2007) (Petitioners "do not allege an independent claim under the ADA but instead allege an IDEA-based claim in the guise of the ADA. . . . [T]he Rehabilitation Act does not provide a

separate and independent cause of action for the [Petitioners'] claim based upon the cited regulations"); *see also Burke v. Brookline Sch. Dist.*, 257 Fed. App'x 335 (1st Cir. 2007) (summarily affirming the district court's decision "under *Diaz-Fonseca*. . . .").

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated: June 10, 2008

Respectfully submitted,

BROOKLINE SCHOOL DISTRICT

By its attorneys,

Dean B. Eggert, Esq.,
Counsel of Record
Alison M. Minutelli, Esq.
Wadleigh, Starr & Peters, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101
(603) 669-4140